

Credit-based financing Instruments and the Development of Waqf Properties

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Abstract

The majority of the classic jurists disapproved loans and charges to be taken by the *nazir* or mutawalli of *waqf*. A handful of jurists in all four schools however did not agree if that was needed, necessary, and in the interest of *waqf* or its beneficiaries. Contemporary jurists follow the minority and have accepted the interest of *waqf* and its beneficiaries as the cardinal foundation for the validity of transactions in *waqf* properties. While the old discussion was primarily based on loan alone, development financing as practiced by modern banks is not found in their discussions. Few contemporary jurists have developed the old concepts based on the prevailing financial instruments (e.g. *murabahah*, *istisna* and *ijarah*), as recognized by Islamic financial institutions, in order to suite the nature of *waqf*. These instruments are modified in a manner that tries to develop the property while the ownership of the land remains with *waqf* institutions. Charges may be permitted but that would be subject to the life of the lease and license granted to the developing entity.

Keywords: *wakaf- waqf – property – land - Islamic finance - bay' bi thaman ajil – murabahah - istisna' – ijarah – Leasing - spot sale - sale on installment - forward sale.*

1. Introduction

The nature of *waqf* property is unique as it is considered perpetually not transferable. Following this rule, many classic jurists in Islamic law reject the notion of a *nazir* having the power to get loan for *waqf*, or lend and charge its property to some one. In Malaysia the law seems to follow this rule and hence, so far, schemes such as *istibdal*, benevolent loan from *baitul mal*, and *saham waqf* are practiced.² This however restricts the chances of developing *waqf* land effectively.

Debt is one of ways that can help in the development of *waqf* property, thus its use is encouraged. But every debt needs to be repaid, and there is the possibility of *waqf* institutions being unable to do so, financial institutions, therefore, require security for payment of their credit.

Nevertheless, the rule of perpetuity is upheld by majority; because *waqf* has no legal personality³,

therefore, sale, debt and charging *waqf* property are not unconditionally accepted by them. Some early jurists in various schools as well as contemporary ulama however tend to recognize the importance of loans and charges in the context of financing and therefore are inclined to recognize both.

They recognized borrowing for daily operational use⁴, improvement and renewal for good revenue,⁵ provided it is needed or for the interest of *waqf*, and there is no other alternative, such as revenue, and the court permits it.⁶ Malikis and Hanbalis,⁷ and some contemporary jurists agree too.⁸ The Sudanese, Egyptian and Kuwaiti laws have almost similar provisions.⁹ Some jurists also allowed lending¹⁰, subject to some conditions¹¹ in order to safeguard *waqf* property.

The general rule in Hanafi¹², Shafie and Hanbali schools is that whatever can be sold can be charged

too. Consequently, waqf property cannot be sold and hence cannot be charged¹³, as charge exposes the given property to unforeseen risk.¹⁴ Malikis thought that the person who can charge a property must have the power to sell¹⁵ and donate it. *Al-Darir* thought that Malikis, therefore, do not object to charging the revenue of the waqf property¹⁶. This rule is followed in Saudi and Kuwait.¹⁷ *Al-Qaradaghi* thinks that the selling of waqf properties, if needed to do so, is permitted by some jurists, and therefore, charge on waqf property should also be allowed, if a need to do so arises, or there is great benefit or when it can prevent a harm greater than charge.¹⁸ *Al-Zuhaili* agrees but adds that if borrowing is approved by court, charges should also need a leave of court.¹⁹ A general permission is implied by Kelantan Enactment, Malaysia.²⁰ The writings of Nazih Hamad, and Anas al-Zarqa on current financial instruments, however, indicate to permit deposit of title document with the financier without any qualification.²¹

As said above, the restriction on the recognition of financial methods limits the chance of development of the waqf properties. Therefore, for the interest of the beneficiaries of waqf properties, the need for the existence of alternative financial mechanism is urgent. The more the financial instruments the more are the chances of developing of the waqf properties.

Currently, there are a variety of financial methods tailored by Muslim jurists especially for the development of waqf properties around the globe. These include credit based instruments, joint ventures, and the securitization of waqf assets in addition to the *saham waqf* and *cash waqf*. Among these, only credit based instruments are chosen to be discussed in this article.

2. Credit Based Financing and Waqf Properties

Credit or debt-based financing refers to the funding obtained by waqf institution through the Islamic modes of financing i.e. sale and purchase, sale by order and leasing agreements. This is called debt-based financing because the sum owed to the financing company would be a debt payable by the waqf institution on installment.

The aforementioned contracts may stand alone or be combined with each other depending on the arrangement made by the parties. Either way, the concept, the legality and practical significance of the transactions will be discussed below.

2.1 Build and Transfer (*Murabahah*) / *bay' bi thaman al-ajil* (BBA)

Murabahah is a mark up sale capable of being a spot sale or on installment. Today, it is associated with a credit sale settled on installments, called *bay' bi thaman al-ajil* (BBA).²² In *murabahah* transactions, there must be one who orders the financier to purchase (*amir bi al-shara*) and another to execute the order (*ma'mur*). Upon procurement and delivery of the objects ordered by the purchaser, the financier will sell the assets to the purchaser at a price which ensures a reasonable rate of profit to the financier.²³

The Organisation of Islamic Countries' (OIC) council for fatwa has accepted this financial instrument, if the sale takes place after the object comes within the possession of the seller (*mamur*); the seller does not transfer risks to the purchaser before possession of the object; the purchaser has been given the option to reject the object based on defect, and all other conditions for the validity of a contract under Islamic law are complied with.²⁴

In Malaysia, *murabahah* is incorporated in sale with deferred payments or BBA.²⁵ Both are the same in terms of effect and payment though *murabahah* may also apply to spot sale. Since BBA is a sale at core, the practice of banks does not comply with the OIC fatwa mentioned above. Saiful Azhar²⁶ explains that there is no difference between the practice of a conventional and Islamic bank, as the purchasers buys the property first and then looks for finance. The transactions look more like a loan rather than a sale he contends. This presumption was confirmed by the case of *Dato' Haji Nik Mahmud bin Daud v Bank Islam Malaysia Berhad* [1996] 1 CLJ 737 where the

¹ This article is a revised version of a portion of a paper presented in the National Convention on Waqf 2006 which was itself an improved account of research project paper, "An Ideal Financial Mechanism for the Development of Waqf Properties in Malaysia", 2005, undertaken by this writer, Dr. Hamid Mar Iman, and Dr Ismail Omar.

² See Mohammad Tahir Sabit et al, *An Ideal Mechanism for the Development of Waqf Properties*, pp. 108-113.

³ Hilal al Ra'y, bin Yahya bin Salmah (d. 245 AH), *Kitab Ahkam al-Waqf*, Haidarabad: Matba'ah Majlas Darirah al-Mu'arif al-Uthmaniyah, 1355 AH pp. 33-34; Ibn Abidin, Muhammad Amin bin Umar bin Abdul Aziz, *al-Uqud al-Durriyyah fi Tanqih Fatawa al-Hamidi*, *Kitab al-waqf*, *Ahkam al-nuzar*; also on database: <http://feqh.al-islam.com/default.asp>, *Kitab al-waqf*, *Ahkam al-nuzar*. Other jurists however allow mutawalli to take loan for waqf and pay the loan from the income of waqf: al-Sediq Muhammad al-Darir, *Duyun al-Waqf*, in Muntada Qadaya al-Waqf al-Fiqhiyyah al-Awwal, *Iltizam Shar'i ... wa Hulul al-Mutajaddidah*, Kuwait: al-Amanah Ammah li al-Awqaf, 2004, p. 25.

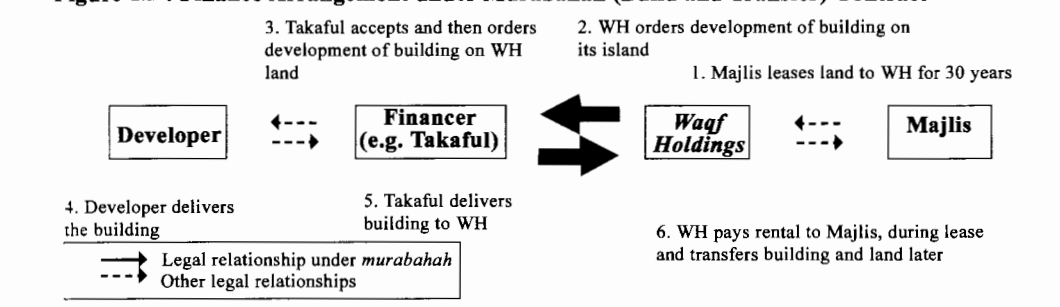
presiding judge thought that there was no intention of the parties (customer and bank) to effect the transfer of the property, and that it was merely a device to facilitate the BBA transaction. This decision makes us think that BBA as practiced by some banks should be avoided in case of *waqf* properties.

Another element of concern is unsubstantiated mark up as banks sell the property plus mark up together with a premium that reflects time value of the money. The shorter the period of payment the cheaper is the finance. A long term arrangement will increase the purchase price to triple of the spot sale value. This is also true about all debt based instruments including *leasing (tajir)*, and the sale by order (*istisna'*)²⁷ Nevertheless, if the conditions set by OIC fatwa are

met and the charges are less and fair, the institution of *waqf* can utilize this financial instrument in any development project.

Kahf believes that this instrument is practical when the *waqf* institution takes 'the functions of an entrepreneur who manages the investment process and buys necessary equipment and materials through a *murabahah* contract'. Payment can be on delivery or deferred. 'The management of *Waqf* becomes a debtor to the banking institution for the cost of the material purchased plus the financing markup which represents the price of the second sale contract in the *murabahah* to the purchase orderer.²⁸ The purchase price will be paid by the orderer of the goods over an agreed period of time. Under this transaction the project is owned by the *waqf* completely.²⁹

Figure 2.1 : Finance Arrangement under Murabahah (Build and Transfer) Contract



Shari'ah is silent on the issue of borrowing by *waqf*. This is however not an issue, for such borrowings are in the interest of *waqf* and hence should be permitted. Issues such as the capacity of *waqf* to develop the land, the ownership of the site, and the possibility of security for the sum borrowed, need consideration. At the moment the majority of *waqf* institutions is perhaps not capable of entrepreneurship and thus cannot manage development project in many places. They have no resources to pay for operation and labor costs. The alternative is to order the development of the site, and the financier can be either the developer or he can contract it to another party. Once complete, the financier can sell it to the *waqf* institution based

on *murabahah*. In theory, this should make *waqf* the owner of the completed project, but in practice a Deed of Assignment is executed in favor of the financier, which is a problem. The Fiqh may support it, as such is in the interest of the *waqf*, but legally this may be doubtful, for under current law *waqf* land is inalienable. To avoid this, the Majlis can device a long lease granted to a newly formed single project based corporation, and thereby enter into a transaction with financier.(see figure 2.1) Here, the newly formed company can sublease the land to another party within the period of the master lease. In case of security, the financier will have limited right in the land depending on the length of the lease.

Table 2.1: Finance Costs Under Murabahah Based On Bank Islam Rates

Financier's purchase price	Financier's selling price in RM	Amount paid at the end of term @ 2.8 Monthly % first; 6% second year; and 8% for installments remaining years		
4800000.00	6182923.80	5 years	5837323	150414.55
	6607601.40	7 years	6262001.40	97327.69
	7282181.86	10 years	6936581.76	49587.55
	8503657.80	15 years	8158057.80	67856.06
	9839613.36	20 years	9494013.36	41998.21
	11279658.72	25 years	10934058.72	38085.72
	12811721.76	30 years	12466121.76	35844.41

Murabahah instrument is practical but its short term requires higher installments while longer term is expensive. (See table 2.1) Presuming the project is completed by a contracted developer,³⁰ at RM 4.8 million, and rented at RM 25040.00 per month,³¹ the loan is 100 per cent and the financier charges variable fees for its services, and profit. It is obvious that the price of the building after 30 years of repayment of loan will be three times of the costs of the building. In case the *waqf* institution chooses to pay in a shorter period, the monthly installments will be higher than the income of the building. In either case the *waqf* institution cannot pay the installments in full, whether or not the corporation deducts its fees and charges. This, therefore, necessitates the reduction in finance which can be at 60 to 80 per cent, to enable the *waqf* institution to pay installments. But, the question is whether or not it will be able to raise the remaining 20-40 per cent of the financing costs. This problem may be solved if *murabahah* can be used together with other forms of finance.

2.2 Forward Sale (*Istisna'* / *Salam*) Mode

Istisna' refers to a contract where one offers and a manufacturer agrees to produce and deliver a certain quality of goods in a specified quantity on a given date in the future. For instance when Islamic Development Bank (IDB) in its normal financial transactions uses *istisna'* contract with Construction Companies, it undertakes to provide a specific equipment or construction material according to certain specifications requested by the beneficiary, and then sell it to the beneficiary at a determined price to be paid over an agreed period. The beneficiary will be the purchaser of the goods. The price gets fixed in advance but needs not be paid at the time of the agreement. The price may be paid in installments in step with the progress of the work (a house, a building, or a factory) or partly at the front and the rest at the time of delivery.³²

Istisna' is somehow similar to the contract of *salam* another form of forward sale. *Salam* however applies to commodities, where the financier advances a sum as purchase price for agricultural commodities to be delivered in future. This may apply to *waqf* land if the land is used for agricultural activity.

Istisna' may be used (1) between *waqf* and developer as shown in figure 2, (2) between *waqf trustee* and a financier and (3) between financier and developer for the development of *waqf* land. The first way is straight forward. The second and third involve *waqf trustee*, the financier and a third party. The *waqf* institution inters into *istisna'* contract with financier, and the financier then enters into another separate *istisna'* contract with a construction company or developer. This is termed back-to-back or parallel *istisna'*. Taqi Uthmani contends that it is not necessary for the financier himself to construct the building. He can enter into a parallel contract of *istisna'* with a third party, or may hire the services of a contractor, other than the client. In both cases, he can calculate his cost and fix the price of *istisna'*.³³ The building will be the property of the financier. The *waqf* institution will take delivery of the building from the financier after its completion.

An *istisna'* between financier and a developer may also follow a *murabahah* and *ijarah* contract. This can be said about Nazih Hammad and Kahf's proposal, that when the *waqf* institution allows financier to construct a building on the *waqf* land.³⁴ The financier then can enter into an *istisna'* contract with a contractor to provide the same to the order of the bank that will be delivered on the bank's behalf to the *Awqaf* management.³⁵ (See figure 2)

Figure 2 : Finance Arrangement under Istina' (Build and Transfer) Contract

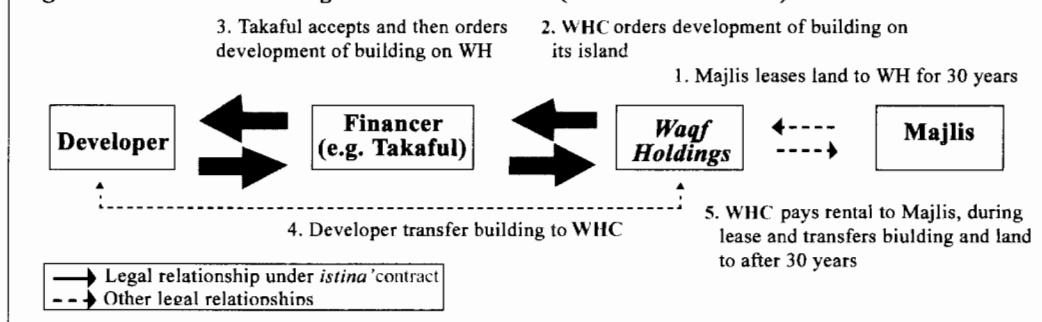


Table 2: Istisna' (Sale by Order)

Status :	Back to back Istisna' (<i>waqf</i> trustee with the bank and bank with the developer)
Operation :	Build and transfer
Financer :	ABC Finance
Builder :	ABC Construction
Property manager :	Waqf Holdings Corporation (WHC)
Nature of dealing :	Single asset development
Site Ownership :	<i>Waqf</i> leased to WH Corporation for 30 years
Building ownership :	WH after completion
Development :	6-storey commercial building
Third party Leasing contract :	Revisable after 3 years

Following the completion of the construction and delivery of the building, in either of the above ways, the financier delivers the said building to *waqf* institution, as in the case of back-to-back *istisna'* and *murabahah* followed by *istisna'*, or leases the building to *waqf* trustee institution i.e. Waqf Holdings Corporation (WHC) under a contract of *ijarah*. The amount will be a debt to the *waqf* management and should be settled based on the returns from the expanded *waqf* property and the financier will not have the right to interfere with the management of the property.³⁶ It can be paid based on monthly (or annual) installments.³⁷ The installments should be less than the expected rentals from the building. Upon the payment of the last installment, the ownership of the building will be transferred to the *waqf* institution. This is what has been practiced in Sudan and Mauritania. It is possible that the title remains with the financier till the last installment.³⁸ This opinion of jurists, however, is not considered locally, even though the effect of *rahn* and charge is the same.

The sale by order (*istisna'*) is considered an ideal financial instrument for *waqf* property, which must be applied.³⁹ The application of IDB's model, however, is suitable for skillful institutions with good cash flow.⁴⁰ For a cash-strapped institution the views of al-Zarqa, Nazih Hamad and Kahf are more practical, but if applied alone *waqf* will be either not able to pay installments or incur higher expenses. (See for instance Table 1)

The *istisna'* model is practical if the land belongs to *waqf* but leased to Waqf Holdings Corporation (WHC) for a period of 30 years, and the building to the financier. The financier, after the completion of

the building, may have two options: (1) transfer the building to Waqf Holdings Corporation, and have a right to possession of the building, secured by a charge; (2) lease the building to the Corporation for a specified period and transfer it to the corporation on the payment of the last installment. Under the first option, a back-to-back *istisna'* or *istisna'* plus *murabahah*, as the case may be, is required. The second option needs *istisna'* between financier and developer plus *ijarah*. The registered charge over the building must extend only up to the tenure of lease. The project should involve a single-asset-based development being transferable to a third party up to the expiry of the lease. Where the Corporation is unable to pay the installments, the financier has the right to possess the building until such a time when the sum owed is paid. In such a case, the corporation would be required to extend the tenure of lease, so that the financier can cover his costs. The Waqf Corporation, being a trustee of *waqf* institution, will have to regularly pay from the income of land and building to *waqf* institution during the life time of the lease. After the expiry of the lease, the Corporation has to transfer the title in the land and the building to the *waqf* trustee/institution free from any encumbrances. (See Table 2 above)

³⁵ al Baghdadi, Majma' al-Damanat, vol. 6 p. 43 (bab al-waqf); Al-Mardawi, Ali bin Sulaiman, al-Insaf, (ktab al-waqf), Dar Ihya al-Turath al-Arabi as on database <http://www.almeshkat.net/books/list.php?cat=41>, Vol. 14 (ktab al-waqf).

³⁶ Muhammad Amin bin Umar bin Abdul Aziz, Ibn Abidin, Radd al-Muhtar sharh Dur al-Mukhtar, (Hashiyah Ibn Abidin), kitab al-waqf, Beirut: Dar al-Fikr 1386 AH vol. 3, p. 580; Kamal al-Din Muhammad bin Abd al-Wahid, Ibn Humam, Fath al-Qadir ala al-Hidayah, Beirut: Dar al-Fikr, nd., vol. 6, 240; Ibn Maah, Al-Muhit al-Burhani, kitab al-Waqf fasl fi tasarruf al-qayim, and mutafarriqat. See further al Baghdadi, Majma' al-Damanat, vol. 6, p. 66; Munzer Kahf Financing The Development Of Awqaf Property, paper prepared for the Seminar on the Development of Awqaf, organized by IRTI, Kuala Lumpur, Malaysia, March 2-4, 1998, p. 17-18; Ali Muhiyuddin al-Qaradaghi, "Duyun al-Waqf", in Muntada Qadaya al-Waqf al-Fiqhiyyah al-Awwal, Iltizam Shar'i ... wa Hulul al-Mutajaddidah, Kuwait: al-Amanah Ammah li al-Awqaf, 2004, p. 51-53; Shams al-Din Muhammad bin Abi al-Abas Ahmad bin Hamzah, Al-Ramli, (d. 1004 A.H.), Nihayah al-Muhtaj ila Sharh al-Minhaj, on Maktabah al-Mishkat.

³⁷ Ghiyath al-Din, Abu Muhammad al Baghdadi, Majma al Damanat, vol. 6 p.50 (bab al-waqf), as on database: www.almeshkat.net/books; Mahmud al-Bukhari ibn Maah, Al-Muhit al-Burhani, kitab al-Waqf fasl fi tasarruf al-qayim as on database: www.almeshkat.net/books; Al-Khatib, Muhammad al-Sharbini, Mughni al-Muhtaj La Ma'rifat Alfaz al-Mihaj, kitab al-waqf, as on database in <http://feqh.al-islam.com/Books.asp>, vol. 2, p. 394.

2.3 Leasing and Hire Purchase (*ijarah thumma Bay'*) Mode

Ijarah means leasing. This is the oldest type of financing for waqf development. Jurists in all the four schools agree on the reconstruction of waqf properties. Irrespective of whether the object being dedicated is for mere personal use of the beneficiaries or as a source of income, they agree that the cost of the reconstruction should be paid from the income of the property, if any. Where there is no such income, the property should be rented to a third party and the income be spent on the reconstruction. Some jurists proposed that in case a parcel of land is shared by a waqf trustee and another party, the other party can reconstruct the property and keep the property for as long as it can recover their costs.

The lease of waqf land is enforceable unless the rental is below the market rate; even rental below the market rate is enforceable, if it is needed. The Hanafi jurists allow the nazir to terminate the existing contract and negotiate a new lease of the property with another willing party if the rental is lower than the market rate and if the leaseholder does not agree with the desired revision of the rent.⁴¹ The Malikis and Shafies do not recognise such option for the existing lease holder⁴² as they consider the contract a binding nullity. The contemporary ulama hold that the leasing contract of waqf property should include provisions for revisions, and the taxes to be payable by the leaseholder alone, and that the leaseholder should not use the premises for purposes against the Shari'ah, law or against the interest of the society.⁴³ This is why leasing is considered a flexible type of financing compared to murabahah and istisna' as the rate of rental can be adjusted according to the market movement.

The Maliki and Shafie schools allow long leases even if they are for a period of 100 years,⁴⁴ as the destruction of property is worse than a long lease. Other jurists in the Hanafi and Hanbalis schools allow leases not exceeding three years.⁴⁵ The Hanafis, nevertheless, in addition to long leases such as *hikr*, *ijaratain*, *mirsad*

and *khulw*, allow succeeding three year contracts extending up to 50 years or more. The contemporary jurists however limit the period up to thirty years,⁴⁶ a restriction that should, however, be based on the viability of the project both for the financer and waqf, rather than merely based on a fixed time.

Ibn Nujaim, a Hanafi jurist, did not allow the lease of a waqf land near a city for construction of houses for rental purposes.⁴⁷ Sheikh Muhammad Mukhtar al-Sulami a former Tunisian mufti, disagreed on the ground that Ibn Nujaim perhaps based his view on the custom of his time. Now, a land close to city might be more productive in terms of development of buildings rather than agricultural produces.⁴⁸ This is similar to the view of Hilal al-Ra'y⁴⁹ and al-Baghdadi.⁵⁰ Both recognised the value of land inside towns and cities and considered its development better than cultivation.

⁸ al-Sediq Muhammad al-Darir, "Duyun al-Waqf", p. 25; Qaradaghi, "Duyun al-Waqf", in Muntada, pp. 53-4.

⁹ al-Darir, "Duyun al-Waqf", p. 28; Qaradaghi, "Duyun al-Waqf", in Muntada, p. 53.

¹⁰ Ibn Humam, Fath al-Qadir, vol. 5, p. 69. al-Darir, "Duyun al-Waqf", p. 28-29; Qaradaghi, Duyun al-Waqf, in Muntada, p. 54; Taqi al-Din, Al-Subki, Fatawa al-Subki, vol. 2, pp. 105 at <http://www.saa'id.net/book/list.php?cat=86>; al-Baghdadi, Majma al-Damanat, vol. 6, pp. 43, 54, 58 (bab al-waqf); Shihabuddin Ahmad bin Idris, al-Qarafi, al-Dhakhirah fi Fiqh al-Maliki, Kitab al-Waqf, Beirut: Dar al-Gharb al-Islami, vol. 6, p. 338.

¹¹ Qaradaghi, "Duyun al-Waqf", in Muntada, 2003, p. 56-57.

¹² Ali al-Qari, Sharh al-Wiqayah, kitab al-waqf, as on <http://www.almeshkat.net/books/list.php?cat=38>

¹³ Ibid. bab fi ahkam al-waqf, vol. 3, p. 87; Mawfaq al-Din Ibn Qudamah, al-Kafi, Kitab al-Bai', bab ma yasihhu rahnahu wa ma la yasihu, as on www.almeshkat.net/books; Al-Kasani, Ala' al-Din Abi Bakr bin Mas'ud, Badai' al-Sana'i' fi Tartib al-Shari'i, Beirut: Dar al-Fikr, 2000, vol. 6, p. 137; Muhammad Amin bin Umar bin Abdul Aziz, Ibn Abidin, Radd al-Muhtar sharh Dur al-Mukhtar, (Hashiyah Ibn Abidin), kitab al-waqf, Beirut: Dar al-Fikr 1386 AH, vol. 4 p. 428; Ibn Qudamah, Mawfaq al-Din, al-Mughni, kitab al-wuquf wa al-Ataya, Al-Riyadh: Maktabah al-Riyadh al-Hadithah, 1401 AH, vol. 4 pp. 125, 221; Muhammad bin Idris, al-Shafie, al-Um, Beirut: Dar al-Marifah, 1990, vol. 3, p. 162; al-Khatib, Mughni al-Muhtaj, vol. 2, p. 121. Al-Khatib, Muhammad al-Sharbini, al-Iqna' fi Hali Alfaz Abi Shuja, (bab al-Rahn), Singapore: Maktabah Sulaiman Maraghi, nd, vol. 2, p. 153 (bab al-Rahn); al-Mardawi, al-Insaf, vol. 5, p. 14.

¹⁴ Qaradaghi, "Duyun al-Waqf", in Muntada, p. 53

¹⁵ al-Qarafi, al-Dhakhirah fi Fiqh al-Maliki, vol. 8, p. 78.

¹⁶ al-Darir, "Duyun al-Waqf", p. 33.

¹⁷ Al-Mayman, "Duyun al-Waqf", in Muntada Qadaya al-Waqf al-Fiqhiyyah al-Awwal, Iltizam Shar'i ... wa Hulul al-Mutajaddidah, Kuwait: al-Amanah Ammah li al-Awqaf, 2004, p. 93.

⁷ Ahmad bin Muhammad al-Sawi, Bulghat al-salik ila Aqrab Maslaik (Hashiyah Al-Sawi), on database at the Saudian Ministry of Awqaf and Islamic Affairs, <http://feqh.al-islam.com/Books.asp> kitab al-waqf; Muhammad Arafah al-Dusuqi, Hashiyah al-Dasuqi, Muhammad bin Ahmad ibn Arfah, Al-Dusuqi, Hashiyah al-Dasuqi ala al-Sharh al-Kabir, bab al-rahm, Dar al-Ihya al-Kutub al-Arabi, n.d., vol. 3, p. 89; Mansur bin Yunus, al-Bahuti, Sharh Muntaha al-iradat, Beirut: Alam al-Kutub, vol. 2, p. 414.

Figure 3 : Building, lease and Transfer

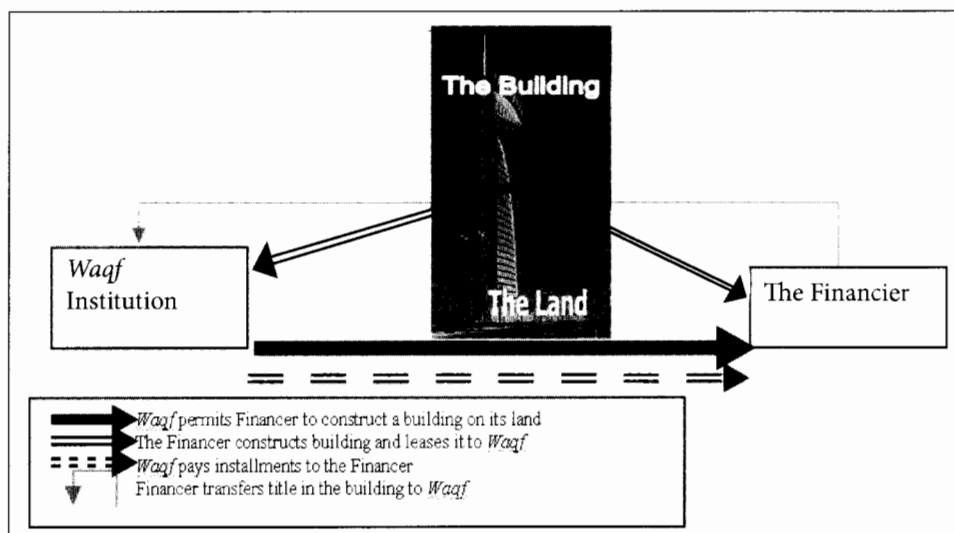


Table 3 : Ijarah thumma Tamlik (hire-Purchase Transactions)

Status:	Leasing (<i>Ijarah Thumma Tamlik</i>)
Operation:	Build, Lease and Transfer
Builder:	ABC Construction
Property Manager:	WHC
Nature of dealing:	Hire-purchase
Site Ownership:	Waqf: a permit (lease) issued in favour of bank for 30 years
Building Ownership:	ABC Construction, leased to Waqf (WH) for 30 years
Development:	6-storey commercial building
Third party Leasing contract:	Possible

Today, lease can be used by *waqf* institutions to finance the development of a given land, and by financial institution to recover their debt. Thus, a lease can be divided into build, lease and transfer mode of development (hire purchase or *al-ijarah thuma al-tamlik*), and also sale, leaseback and transfer. Both are discussed below.

2.3.1 Build, Lease, and Transfer (*Ijarah Thumma Tamlik*)

The modus operandi of *ijarah* for the development of a *waqf* land is proposed by Kahf. The *nazir* issues a permit, valid for a given number of years only, to the institutional financier allowing it to erect a building on a *waqf* land. Then, the *nazir* leases the building for the same period during which it is owned by the financier, and the *nazir* uses it for the benefit of the *waqf* objective such as a hospital, a school, or as an investment property such as rental offices

or apartments.⁵¹ At the end of the permit period, the financier would have obtained its principal and desired profit, and thus transfer the building to the *waqf nazir* either through a sale, a gift, or a mere disposal by way of abandonment. (See figure 3)

The contract should be reviewed periodically in order to adjust the rentals.⁵² The *nazir* runs the management and pays the periodical rent to the financier.⁵³ (See table 3) This model is practiced by the IDB, which finances industrial goods, construction, including others fix assets, for a certain period of time during which the borrower pays biannual rentals, and at the end, the ownership of the assets is transferred to the beneficiary.⁵⁴ Similar approach can be taken in Malaysia.

Whereas this instrument of leasing presupposes ownership of *waqf* in land, land revenue must be specified, and transfer of land to the financier needs to be registered. Kahf is silent on both. To settle both

issues, it is suggested that instead of giving a permit, the land can be leased to Waqf Holdings Corporation to be re-leased to the financier. As the building, after reconstruction, is the property of the financier in the Islamic law,⁵⁵ the financier can lease the building to a Waqf Holdings Corporation.

Ijarah thumma al-bay' is the same as hire purchase, which can be undertaken under the Islamic Banking Act 1983, which allows banks to operate the real leasing business under one roof.⁵⁶ The Banking and Financial Institution Act 1992 of Malaysia, however, does not have such a provision, unless the bank establishes a leasing subsidiary registered under Companies Act. Therefore, alternative funds need to be obtained.

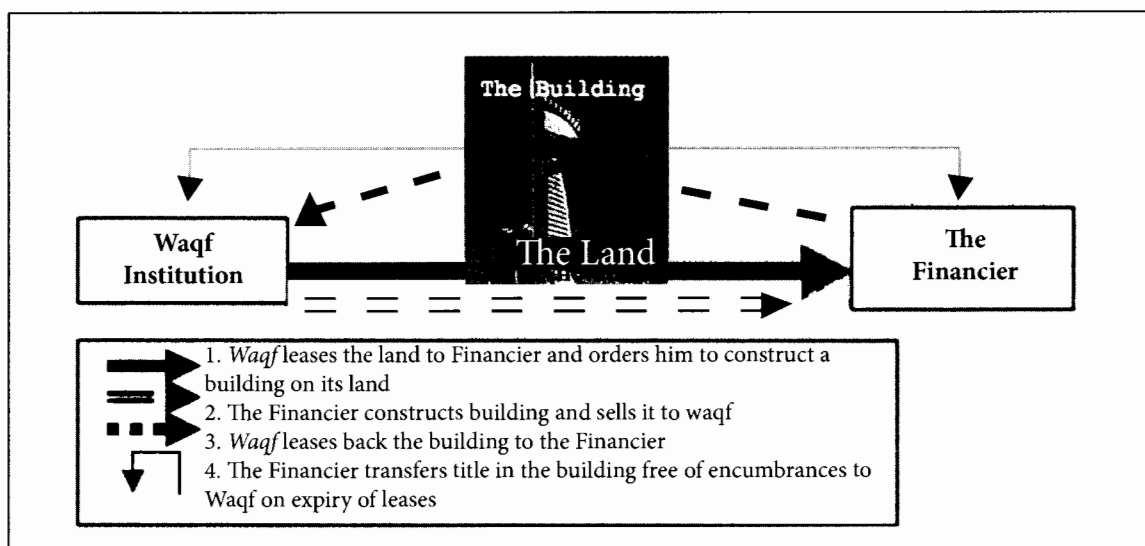
Similarly, the Hire Purchase Act 1967 applies to *ijarah thumma al-bay'*, but then the lessor should pay for insurance, taxes, and maintenance. This side of Islamic hire purchase, however, is not covered by the Hire-Purchase Act 1967. To accommodate this requirement, there is a need for amendment of the Hire Purchase Act 1967, or the enactment of a new legislation.⁵⁷

In economic sense, this mode of financing is the same as *istisna'* that is, if used alone the waqf institution cannot pay installment fees even though it is on a long term basis.

2.3.2 Build, Transfer and leaseback (*Mersad*)

This mode of financing is based on the long lease alone. Two methods are proposed. Al-Zaqa and Nazih Hamad have proposed that the leaseholder under the lease contract would be allowed to construct a building on the land. The building will be owned and occupied by the developer, provided that the total amount of annual rental is sufficient to discharge purchase price of the building at the expiry of lease. The contract will consist of two main terms: the long lease and the promise by the waqf institution to buy the building. The price of the building should be paid out of the annual rentals.⁵⁸ An accurate description of this mode would be as lease, build, occupy and transfer. The leaseholder will be the developer/financier.

Figure 4 : Build, Transfer and leaseback



¹⁸ Al-Qaradaghi, "Duyun al-Waqf", p. 65.

¹⁹ Al-taqibat wa al-munaqashat fi mawdu' duyun al-waqf, in Muntada Qadaya al-Waqf al-Fiqhiyyah al-Awwal, Iltizam Shar'i ... wa Hulul al-Mutajaddidah, Kuwait: al-Amanah Ammah li al-Awqaf, 2004, p. 110.

²⁰ Council of the Religion of Islam and Malay Custom, Administration of Kelantan, Enactment, 1994, s. 62 (4).

²¹ Nazih Hamad, "Asalib Istithmar al-Awqaf wa Ausas Idaratiha", in Abahth Nadwah Nahwa Dawr Tanmiwi li al-Waqf, al-Kuwait: Wizarah al-Awqaf wa Shu'un al-Islamiyah, 1993, p. 184; Anas al-Zarqa, "al-Wasa'l al-Hadithah liltamwil wa al-Istithmar", Idarah wa Tathmir Mumtaakat al-Awqaf (1983-4), Jeddah: IDB 1994, p. 196.

Table 4 : *Ijarah*, and *istisna'*

Status :	Leasing (<i>Ijarah</i> + <i>istisna'</i> + <i>ijarah</i>)
Operation :	Lease Build, sell and leaseback
Builder :	ABC Construction
Property manager :	WH
Nature of dealing :	Build, sale, and leaseback
Site Ownership :	Waqf: lease issued in favor of financier for 30 years
Building ownership :	WH, leased to ABC for 30 years
Development :	6 story commercial building
Third party Leasing contract :	Possible, preferably not

Modified model proposed by Mustafa al-Zarqa, Anas al-Zarqa, Nazih Hamad, and Kahf

The second method is explained differently. The administrator or the judge allows the tenant to develop the land. The incurred expenses are thought to be a loan to the *waqf* institution, payable by the Institution on installment. The building or plantation, as the case may be, shall be the property of the *waqf* institution but the developer would have proprietary rights (e.g. as a leasee) which shall be transferable and inheritable, provided that the transfer to another party is done with the approval of the court or the consent of the administrator of the *waqf*. The developer after the completion of the building would rent the building back and pay monthly market rental to the *waqf* institution. An example of *mersad* may be the practice in Sudan where the developer constructs a building, and then rents it out according to the market rate.⁵⁹ Al-Amin has contended that this is done based on the contract of *istisna'*, and Anas al-Zarqa has added deficient partnership (*musharakah mutanaqisah*).⁶⁰ This is illustrated in figure 4.

Following the *mersad* model, the *waqf* institution cannot evict the developer. This is not in line with the modern market trends and perhaps is not attractive. The almost perpetual right of the developer to the building needs to be limited in time; the shorter period be based on a proper study of the project, and market demand, while it should not exceed 30-40 years. The purchase of building is possible through *istisna'*. (See table 4)

This mode of finance is similar to the above mentioned debt based instruments and thus suitable for partial financing of the project. The *waqf* institution needs to use its development arm i.e. the *Waqf Holdings Corporation* as mentioned above. The *waqf* institution can manage the building or it can contract its management to a third party.

3. Conclusion

Despite the disapproval by some jurists of borrowing by the trustee of *waqf* property, there is a wide range of opinions, both old and contemporary, on the permissibility of borrowing by the *nazir*, if it is in the interest of *waqf* or its beneficiaries. *Ijarah* is recognised almost by all jurists to be used for financing *waqf* properties, which sometime may be similar to the modern form of financing. *Istisna* and *murabahah* are the new forms of financing with some modification to the concept of *ijarah* in order to suit the nature of *waqf* properties.

There is a legal maxim purporting that the words of the donor (*waqif*) are the words of the lawgiver. Related to this is the view that the *fiqh* of *waqf* is based on *ijtihad*. This being so, all reasons concerning the validity or invalidity of certain instruments of finance circles around the fulfillment of the intention of the donor and safeguarding of the perpetuity of the dedication. This being the nucleus of the *mu'amalat waqf*, any forms of transaction including debt-based financing tools that promotes and safeguard

⁵⁹ Nazih Hamad, "Asalib Istithmar al-Awqaf wa Ausas Idaratiha", in Abath Nadwah Nahwa Dawr Tanmiwi li al-Waqf, al-Kuwait: Wizarah al-Awqaf wa Shu'un al-Islamiyah, 1993, p. 184; Anas al-Zarqa, "al-Was'al al-Hadithah liltamwil wa al-Istithmar", Idarah wa Tathmir Mumtaakat al-Awqaf (1983-4), Jeddah: IDB 1994, p. 196.

⁶⁰ See Taqi Uthmani, Mufti, Forward Sales and Manufacturing Contracts: Salam And Istisna, http://www.albalagh.net/Islamic_economics/salam_istisna.shtml#Istisna. Date accessed 3/6/06.

⁶¹ Fatwa No. 40-41, December 1988.

⁶² Saiful Azhar Rosly, Critical Issues on Islamic Banking, pp 87-88.

⁶³ Id., pp 88-89, 91.

⁶⁴ Sudin Haron, A Comparative Study of Islamic Banking Practices, <http://www.kaau.edu.sa/CENTERS/SPC/page-092.htm>. Date, 27/7/2006.

⁶⁵ Munzer Kahf, Financing the Development of Awqaf Property, <http://www.kahf.net/English/finawqf.html>, pp. 22-23.

⁶⁶ Munzer Kahf, Tamwil al-Tanmiya, <http://www.kahf.net/English/finawqf.html>, p 44.

the continuation of waqf and its income are in the interest (maslahah) of waqf and its beneficiaries, and therefore need recognition, enforcement and application.

These modes need to be recognised as complimentary instruments due to the inability of waqf institution to pay the financial burden, if these instruments are utilised solely. The institution of waqf has the duty to safeguard the interest of the beneficiaries and, therefore, should not only be concerned with the development of the waqf properties alone, as a development without contribution to the welfare of society is meaningless. For this it should be the duty of the institution to use the above instruments in a manner that safeguards the existence of productive waqf as well as its benefit to the beneficiaries. Hence, it is suggested that these instruments be used together with other mechanisms so that the waqf institution can minimise losses of income of the property concerned.

³⁰ Two other ways of practice may be possible: first when the waqf institution requires the bank to deliver a constructed building on its land, the banks can employ an istisna contract with development company and then sell the product to the waqf institution through mark up sale (murabahah) by installment. The second way is to order banks to purchase a constructed site belonging to a third party. Here there would be no need for istisna' contract.

³¹ These figures are based on the costs of Bangunan Wakaf, Johor, which was built on proceeds of saham wakaf at 4.8 million and now is rented at RM 25040.00, per month.

³² M. Umer Chapra, *The Major Modes of Islamic Finance*, A paper prepared for presentation at the 6th Intensive Orientation Course on "Islamic Economics, Banking and Finance" held at the Islamic Foundation, Leicester, U.K., on 17th - 21st September 1998, p. 22; According to the OIC Islamic Fiqh Academy Resolution, the payment may be deferred by mutual agreement.

³³ Taqi Uthmani, Mufti, *Forward Sales and Manufacturing Contracts*, above.

³⁴ Nazih Hamad, "Asalib Istithmar al-Awqaf", p. 184.

³⁵ Kahf, *Financing the Development of Awqaf Property*, p. 23.

³⁶ *Ibid.*

³⁷ Taqi Uthmani, Mufti, *Forward Sales and Manufacturing Contracts: Salam And Istisna*, above.

³⁸ Anas al-Zarqa, "al-Wasa' al-Hadithah liltamwil wa al-Istithmar", p. 197. Nazih Hamad, "Asalib Istithmar al-Awqaf wa Ausas Idaratih", pp. 184-85.

³⁹ Mahmud Ahmad al-Mahdi, "Tajrabah al-Bank al-Islami liltanmiyah fi Tathmir al-Awqaf al-Islami", in Abahth Nadwah Nahwa Dawr Tanmiwi al-Waqf, Jeddah: IDB, 1993, p. 88.

⁴⁰ It is noted that this method lacks a scheme according to which the bank can finance the purchase of the goods and material required by waqf institution. Based on this point, al-Mahdi points that istisna' is more to the mode of execution rather than financing. Al-Mahdi further questions the practicality of this solution, for this presupposes the waqf institution to be able to implement the project and have enough cash flow to fund the development work. He reminds the reader that in many instances the waqf institution is cashless: see Mahmud Ahmad al-Mahdi, "Tajrabah", p. 81.

⁴¹ Ibn Abidin, *Radd al-Muhtar*, vol. 4, pp. 371, 404.

⁴² Al-Dardir, in Hashiyah al-Dusuqi, vol. 4, p. 95; al-Khatib, *Mughni al-Muhtar*, vol. 6, 395.

⁴³ al-Mahdi, "Tajrabah", p. 87.

⁴⁴ Al-Khatib, *Mughni al-Muhtar*, vol. II, p. 349; al-Qarafi, *al-Dhakirah*, vol. 6, p. 346. Ibn Abidin, *Radd al-Muhtar*, vol. 3, 397.

⁴⁵ Ibn Abidin, *Radd al-Muhtar*, vol. 3, 397.

⁴⁶ al-Mahdi, "al-Tajrabah", p. 88.

⁴⁷ Ibn Nujaim, *Bahr al-Rai'iq*, vol. 5, p. 223.

⁴⁸ Sheikh Muhammad Mukhtar al-Sulami, *Istithmar Amwal al-Waqf*, in Muntada Qadaya al-Waqf al-Fiqhiyyah al-Awwal, *Iltizam Shar'i ... wa Hulul al-Mutajaddidah*, Kuwait: al-Amanah Ammah li al-Awqaf, 2004, p. 137.

⁴⁹ Hilal al-Ra'y, *Ahkam al-Waqf*, p. 20.

⁵⁰ Al-Baghdadi, *Mama' al-Damanat*, 6/111

⁵¹ Kahf, *Financing the Development of Awqaf Property*, p. 23.

⁵² Kahf, *Tamwil al-Tanmiyah al-Amwal al-Waqf*, p. 45.

⁵³ Kahf, *Financing the Development of Awqaf Property*, p. 24.

⁵⁴ al-Mahdi, "Tajrabah al-Bank al-Islami liltanmiyah", p. 88.

⁵⁵ The courts in Malaysia have recognized this type of rights as "a licence coupled with an equity": *Majlis Perbandaran Pulau Pinang v Syed Ahmed a/l MM Ghouse Mohamed* [2007] 1 MLJ 42 at 44.

⁵⁶ Saiful Azhar, *Critical Issues*, pp. 103-104.

⁵⁷ *Id.*, at pp. 105-106.

⁵⁸ Nazih Hamad, "Asalib Istithmar al-Awqaf", p. 186; Anas al-Zarqa, "Asalib", p. 199.

⁵⁹ Hasan Abdullah Al-Amin "al-Waqf fi al-Fiqh al-Islami", in *Idarah wa Tathmir al-Mumtalakat al-Awqaf*, Jeddah: IDB, 1994, p. 135.

⁶⁰ *Id.*, at pp. 134-5; Anas al-Zarqa, "Asalib", p. 197.